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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 688

JOHN T. DAVIS,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JOHN T. DAVIS,

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA.

The petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Indiana entered in the above entitled cause on April 10, 1961.

CITATIONS TO OPINIONS BELOW.

The opinion of the Appellate Court of Indiana (R. 120-135), printed in Appendix B hereto, *infra*, pp. 13-28, is reported in 173 N. E. 2d 749. The dismissal of petitioner's petition for rehearing by the Appellate Court of Indiana (R. 141), is unreported and is printed in Appendix B hereto, *infra*, p. 28. The denial by the Supreme Court of Indiana

of petitioner's petition to transfer the cause to that court (R. 165), is unreported and is printed in Appendix B hereto, *infra*, p. 28.

JURISDICTION.

The judgment of the Superior Court of Vanderburgh County, Indiana, upon sustaining respondents' separate demurrers to petitioner's amended complaint was entered *nunc pro tunc* as of August 4, 1958. (R. 88.)

The cause was appealed to the Appellate Court of Indiana, having jurisdiction of such appeal,[1] and the transcript of the record (R. 10-119) and the assignment of errors (R. 8-9), that the lower court erred in sustaining the separate demurrers (R. 52-57) of the respondents to petitioner's amended complaint (R. 21-29) and in sustaining their separate motions to strike out petitioner's second amended complaint (R. 95-101), were filed on October 30, 1958. (R. 1.) The judgment of the Appellate Court of Indiana sustaining the lower court on each specification of assigned errors was entered on April 10, 1961. (R. 2.) A timely and proper petition for rehearing[2] (R. 136-138) filed on April 27, 1961 (R. 2), was dismissed by the Appellate Court on May 11, 1961. (R. 2.)

A timely and proper petition to transfer[3] the cause to

1. For convenience, Section 4-214, Burns Indiana Statutes Annotated, 1946 Replacement (Acts 1901, ch. 247, § 9, p. 565; 1907, ch. 148, § 1, p. 237; 1915, ch. 76, § 1, p. 149; 1925, ch. 201, § 1, p. 487), conferring jurisdiction on the Appellate Court, is printed in Appendix C, *infra*, pp. 30-31.

2. For convenience, Rule 2-22, Rules of the Supreme Court of Indiana, which is the authority for petitions for rehearing on appeals to the Appellate Court of Indiana, is printed in Appendix C, *infra*, p. 29.

3. Rule 2-23, Rules of the Supreme Court of Indiana, and Section 4-215, Burns Indiana Statutes Annotated, 1946 Replacement (Acts 1901, ch. 247, § 10, p. 565; 1933, ch. 151, § 1, p. 800), governing petitions to transfer in appeals in Indiana, is printed in Appendix C, *infra*, p. 29.

the Supreme Court of Indiana (R. 142-156), the highest court of last resort in the State of Indiana,[4] filed on May 31, 1961 (R. 2), was denied by the Supreme Court of Indiana on November 2, 1961. (R. 3.)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since rights are specially set up and claimed under the statutes of the United States.

QUESTIONS PRESENTED.

1. Whether in an action brought in a State court under the Federal Employers' Liability Act the question of properly pleading specific acts of negligence is controlled and governed by federal rules of pleading in such cases rather than those laid down in the decisions of the appellate courts of the particular State.

2. Whether in an action brought in a State court under the Federal Employers' Liability Act, wherein a previous illness on the part of the employee operates with the subsequent employment of such employee by such employer to bring about his injury, a specific allegation, essential to the stating of a cause of action, is that the injured employee himself did not know that by reason of his previous illness his physical condition was such, when subsequently returned to work, as to increase his risk of injury to himself, even though the employer possessed such knowledge.

3. Whether in an action brought in a State court under the Federal Employers' Liability Act a presumption of knowledge on the part of the employee may be indulged by the court, in considering a demurrer to a complaint, to

4. For convenience, Sections 4-214, Burns Indiana Statutes Annotated, 1946 Replacement (Acts 1901, ch. 247, § 9, p. 565; 1907, ch. 148, § 1, p. 237; 1915, ch. 76, § 1, p. 149; 1925, ch. 201, § 1, p. 487) and 4-215, Burns Indiana Statutes Annotated, 1946 Replacement (Acts 1901, ch. 247, § 10, p. 565; 1933, ch. 151, § 1, p. 800), which are the authority of the Supreme Court of Indiana in civil appeals, are printed in Appendix C, *infra*, pp. 30-32.

defeat such employee's cause of action because there is no allegation specifically negating such knowledge.

4. Whether in an action brought in a State court under the Federal Employers' Liability Act negligence is alleged when it is charged that the employer returned an employee who had been ill to his job without first determining, by proper and adequate means, the employee's physical fitness therefor, although such employer knew that the natural tendency of such illness was to produce a physical condition in the employee which exposed the employee to greater risks of harm on the job, and, in the exercise of reasonable care and caution could and should have determined by such means that the employee's physical condition, upon returning for assignment to work, was such that it was reasonably probable that, if he resumed his employment, he would fall prey and victim to the very conditions which did result from his return to work.

5. Whether in an action brought in a State court under the Federal Employers' Liability Act negligence on the part of the employer, in returning an employee to work, is solely dependent upon an absence of knowledge on the part of the employee that by reason of the previous illness his physical condition was such as to increase his risk of injury to himself when subsequently returned to work, even though the employer himself possessed such knowledge before such employee returned to work.

6. Whether in an action brought in a State court under the Federal Employers' Liability Act negligence is alleged when it is charged that the employer returned an employee, who had been ill, to his job without taking reasonable precautions of furnishing safeguards to reduce the risk of harm to the employee by reason of his physical condition produced by such illness when the employer knew that the risk existed under such circumstances.

7. Whether in an action brought in a State court under the Federal Employers' Liability Act an employee's knowledge that by reason of a previous illness his physical condition was such as to increase his risk of injury to himself when he returned to work for the employer spells contributory negligence or assumption of risk as a matter of law at the pleading stage of the case.

8. Whether in an action brought in a State court under the Federal Employers' Liability Act contributory negligence on the part of the employee is a bar to the employee's right to recover damages for personal injuries.

9. Whether in an action brought in a State court under the Federal Employers' Liability Act assumption of risk is a bar to the employee's right to recover damages for personal injuries.

10. Whether in an action brought in a State court under the Federal Employers' Liability Act principles of master-servant law shall be applied at the risk of destroying and nullifying the purpose for which the Act was passed by Congress.

11. Whether an attempt to plead a cause in a State court under the Federal Employers' Liability Act may be nullified and obstructed by holding therein that such attempt has been waived by the filing of further pleadings therein, although in fact the question has been properly reserved under the holdings of the particular State.

STATUTES INVOLVED

The statutory provisions involved are Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65, and Aug. 11, 1939, ch. 685, §1, 53 Stat. 1404, 45 U. S. C. §51; Apr. 22, 1908, ch. 149, § 3, 35 Stat. 66, 45 U. S. C. § 53; Apr. 22, 1908, ch. 149, § 4, 35 Stat. 66, and Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 45 U. S. C. § 54; and Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66, Apr. 5, 1910, ch.

143, § 1, 36 Stat. 291, Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167, Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404, June 25, 1948, ch. 646, § 18, 62 Stat. 989, 45 U. S. C. § 56. They are printed in Appendix A. *infra*, pp. 11-12.

STATEMENT.

A complaint for damages for personal injuries occurring on the 14th day of July, 1953, was filed by the petitioner against the respondents in the Superior Court of Vanderburgh County, State of Indiana, on July 12, 1955. (R. 11.) The cause of action arises under the Federal Employers' Liability Act.

HOW FEDERAL QUESTION IS PRESENTED.

Thereafter, on December 16, 1955, petitioner filed his amended complaint (R. 27, 29-37), to which respondents on December 30, 1955, and on January 3, 1956, first filed their separate motions (R. 38-55) and then on June 14, 1956, their separate demurrers. (R. 59-65). On October 8, 1956, the court sustained each of the demurrers without assigning any reasons (R. 68), to which rulings of the court the petitioner excepted. (R. 68.) The petitioner thereupon, on October 11, 1956, filed his petition to reconsider the court's rulings on each of the demurrers to his amended complaint. (R. 69.) This motion was sustained over objections by respondents, but each of the demurrers was again sustained by the court on January 29, 1958, without assigning any reasons. (R. 72.)

On June 12, 1958, petitioner filed his second amended complaint (R. 74, 94-102), and on June 20 and on June 23, 1958, respondents filed their separate motions to strike it out. (R. 75-76, 103-110.) Each of these motions was sustained by the court on August 4, 1958, without assigning

any reasons (R. 87), to which rulings of the court the petitioner at the time excepted. (R. 87.)

Thereupon the petitioner refiled his amended complaint, the respondents refiled their separate demurrers thereto, and the court again sustained each of the demurrers without assigning any reasons. (R. 87.) Judgment was accordingly entered on August 4, 1958, for each of the respondents and against the petitioner upon the refusal of the petitioner to plead further. (R. 87-88.)

Petitioner appealed from the judgment, and on October 30, 1958, filed the transcript of the record and the assignment of errors with the Appellate Court of Indiana (R. 1), having incorporated into the record the second amended complaint and the separate demurrers addressed to that pleading by special bill of exceptions. (R. 89-111.) On April 10, 1961, upon the basis of the assigned errors, the Appellate Court of Indiana affirmed the action of the lower court in sustaining the demurrers to the amended complaint on each occasion and in striking out the second amended complaint upon the motions therefor by the respondents by its opinion and judgment (R. 2), upon the grounds, as to the demurrers, that under the rules of pleading in the State of Indiana, which controlled in such a case, petitioner had failed to allege any factual negligence on the part of the respondents in his amended complaint, was himself presumed to have knowledge of his physical condition when he returned to work for the respondents because he had failed to negate such knowledge by any allegations in his amended complaint, and, being clothed with such knowledge by the presumptive route, insulated the respondents, so to speak, from any negligence in returning him to work, and, as to the motion to strike, that petitioner had waived any objections that he might have had to striking out the second amended complaint by refiling his amended complaint.

On April 27, 1961, petitioner filed a timely and proper

petition for rehearing in the Appellate Court of Indiana. (R. 2.) On May 8, 1961, respondent, Louisville and Nashville Railroad Company, filed its petition to dismiss petitioner's petition for rehearing on the ground that petitioner had failed to comply with the controlling Rules of the Supreme Court of Indiana in the form of his petition for rehearing. (R. 2.)[5] On May 11, 1961, without affording petitioner an opportunity or an adequate period of time within which to be heard (R. 151-156), the Appellate Court of Indiana dismissed the petition for rehearing (R. 2) for failure to comply with Rule 2-22. (R. 2.)

Petitioner, on May 31, 1961, filed a timely and proper petition to transfer the cause to the Supreme Court of Indiana. (R. 2.) On June 2 and June 5, 1961, respondents filed their petitions to dismiss petitioner's petition to transfer (R. 2, 3) on the grounds that petitioner failed to comply with Rule 2-22, Rules of the Supreme Court of Indiana, and thereby had waived any errors in the opinion and judgment rendered by the Appellate Court of Indiana in the cause and his right to transfer under the Rules of the Supreme Court of Indiana.

The Supreme Court of Indiana abstained from taking any action on respondents' petitions to dismiss petitioner's petition to transfer, but on November 2, 1961, denied petitioner's petition to transfer. (R. 3.)

REASONS FOR GRANTING THE WRIT.

1. The decision and judgment of the Appellate Court of Indiana in the instant case is an open disavowal of the rule of law laid down in the case of *Brown* v. *Western Railway of Alabama*, 1949, 338 U. S. 294, 94 L. Ed. 100, 70 S. Ct. 105, and will mark an onslaught on this Court's

5. For convenience, Rule 2-22, Rules of the Supreme Court of Indiana, the Rule which respondent claimed was not followed, is printed in Appendix C, *infra*, p. 29.

rightful and intended guardianship over the orderly and uniform administration of the Federal Employers' Liability Act as long as it goes unchallenged. If permitted to stand, a breach is provided through which the purpose of the Act could be thwarted by a usurpation of an unintended supervision by State courts wielding the power of their opinions.

2. The evident purpose of the Act is to relieve the burden of litigation for the federal judiciary, which the Congress of the United States envisioned its enactment would bring, by providing the judiciary of the individual States with concurrent jurisdiction. But this purpose has not, and cannot, be treated as permitting a dual and unamenable control in the administration and interpretation of the Act in its material and basic aspects. Otherwise, an intolerable and destructive situation in the form of a conflicting "state" rule would demand a place alongside the precedents established by the decisions of this Court in this field. This is the effect of the holdings in the cases of *Dice* v. *Akron, Canton & Youngstown Railroad Company*, 1952, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, and *Arnold* v. *Panhandle & Santa Fe Railway Company*, 1957, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840.

Yet this is one of only two courses open if the instant decision and judgment of the Appellate Court of Indiana—appearing as it may as a mere grain of sand in the judicial structure of the Act—is allowed to assume the dimensions of precedent through recognition. The alternative would call for either legislative correction by denial of jurisdiction to the States or adjustment through judiciary selection by parties-plaintiff. A probable result of either of these courses would be additional burdens placed on the federal judiciary by the cases brought under the Act and a consequent and unavoidable prolongation in the time that an

injured claimant, cut off from his usual sources of income, or his dependents, deprived of their "bread winner through death, would have to limp and suffer along the path of daily existence at something approaching, if not indeed amounting, to the lowest level of human functioning.

None of these courses is compatible with the spirit and the letter of the Act.

3. Waiver denotes choice freely exercised to the extent of the limits allowed. If a State court can, under the guise of procedure, restrict that exercise of choice, when so expressed, by an unrealistic treatment amounting to compulsion when applying the remedies provided by the Act, the remedies intended by the Act themselves breathe limitation and fail in the fulfillment of their purposes. This the Appellate Court of Indiana has accomplished by its opinion and judgment in upholding the ruling of the lower court in striking out petitioner's second amended complaint, on the ground that the petitioner had waived any error of the lower court in so doing by refiling his amended complaint, when the petitioner has reserved the question in the manner in which he has brought it forward in his appeal.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RUSSELL S. ARMSTRONG.
JOHN D. CLOUSE.
Counsel for Petitioner.

January 31, 1962.

APPENDIX A.

45 U. S. C.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. (Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.)

§ 53. Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: * * *. (Apr. 22, 1908, ch. 149, § 3, 35 Stat. 66.)

§ 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *. (Apr. 22, 1908, ch. 149, § 4, 35 Stat. 66; Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.)

§ 56. Actions; limitation; concurrent jurisdiction of courts.

* * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states. (Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66; Apr. 5, 1910, ch. 143, § 1, 36 Stat. 291; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404; June 25, 1948, ch. 646, § 18, 62 Stat. 989.)

APPENDIX B.

(Filed Apr. 10, 1961, Alice C. Whitecotton, Clerk.)

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IN THE APPELLATE COURT OF INDIANA

Division No. 1.

John T. Davis,
Appellant.
vs.
Louisville and Nashville Railroad Company, Chicago and Eastern Illinois Railroad Company,
Appellees.
} No. 19,266.

APPEAL FROM THE VANDERBURGH SUPERIOR COURT.
Hon. Francis E. Knowles, Special Judge.

MYERS, *J.*

This is an appeal from a judgment entered in the Superior Court of Vanderburgh County, Indiana, wherein demurrers were sustained to appellant's amended complaint

to recover damages for personal injuries sustained by appellant, pursuant to the provisions of the Federal Employers' Liability Act.

In substance, appellant alleges in his complaint that appellees were engaged in the business of maintaining and operating railroads in interstate commerce; that their trains went into and departed from the Union Depot at Evansville, Indiana; that the two appellees herein had an understanding and agreement between themselves for the servicing and readying of trains which ran between Evansville and Chicago, Illinois; that this servicing included the icing of passenger coaches and Pullman cars for air-conditioning purposes and the preparation of ice water; that on July 14, 1953, appellant, 37 years of age, was employed by appellee, Louisville and Nashville Railroad Company, and had been so employed continuously for a considerable time prior thereto, that appellant's duties included the icing of the passenger coaches and Pullman cars of both appellees, pursuant to their agreement with each other; that approximately one month prior to July 14, 1953, appellant while so employed was suddenly taken ill with a heart attack and compelled to leave his work temporarily; that this illness and "physical condition resulting therefrom" was known to both appellees, because it was "observed" by appellant's superior at work, who was an agent of appellees acting within the scope of his authority.

The complaint proceeds to allege that thereafter, but prior to July 14, 1953, appellant returned to his said employment with the "acquiescence and consent" of appellees; that they carelessly and negligently failed to determine or ascertain appellant's "true physical condition" and to have appellant examined by a reputable physician in order to determine his fitness to return to his work; that appellees could have so determined his "true

physical condition," which condition was such as to make it reasonably probable that his said work would have been injurious to his health and would produce the ailments complained of, that is, a heart attack and asthma; that, with their knowledge of appellant's "said condition," appellant was ordered to perform his customary work, and that he did so perform it.

Appellant further alleges that the "nature of plaintiff's said illness," prior to July 14, 1953, and the "symptoms resulting therefrom" were such as to indicate the propriety of a physical examination before permitting him to return to work; that he was required to lift blocks of ice weighing approximately fifty pounds each, and to either throw them to some one on top of a car or to catch them; that in so handling the ice his body became saturated with moisture and that he was required to remain in a saturated condition for long periods of time with no opportunity afforded to become dry.

Appellant next alleges that on or about the 14th day of July, 1953, while he was so employed by appellees, and while acting in the scope of his employment, and while he was engaged in icing the coaches and Pullman cars of a train, he was, on account of his said work, "caused to become sick, sore, and disabled, and he did then and there finally suffer an attack of asthma and a heart attack, from which said conditions thus produced, and the consequential and residual effects thereof, plaintiff has ever since been forced and compelled to suffer, and plaintiff will forever hereafter suffer therefrom."

The complaint goes further to allege that the appellees, and each of them, were careless and negligent in the following respects:

> "A. In carelessly and negligently allowing and permitting and ordering, commanding, and directing plaintiff to perform and to engage in said type of

employment, as aforesaid, without first ascertaining his physical fitness therefor.

"B. In carelessly and negligently failing and neglecting to afford or to provide plaintiff with a means of avoiding or counteracting the effects of said moisture and saturation upon his body and person.

"C. In carelessly and negligently failing and neglecting to afford or to provide plaintiff with a means of protecting his body and person from said moisture and saturation attending his said work.

"D. In carelessly and negligently failing and neglecting to furnish and provide adequate assistance, means, or modern approved equipment to aid him and lighten his tasks in said handling and movement of said blocks of ice for the purposes, as aforesaid.

"E. In carelessly and negligently using blocks of ice of such dimensions, sizes, and weights, as aforesaid, in the said air-conditioning of said passenger coaches and Pullman cars of said trains."

It was then alleged that as a result of the alleged negligence appellant was and would be subject to medical and hospital expenses, that he was totally and permanently incapacitated, and damages were asked in the amount of $100,000.

Each of appellees filed its separate motion to make more specific and to strike certain designated parts of the complaint, on the ground that the averments set forth were conclusions of fact, and asked that appellant be required to plead sufficient facts to constitute negligence as a matter of law. Attached to each motion was a memorandum in support thereof. These motions were overruled by the trial court.

Thereafter each of the appellees filed a demurrer to the complaint, based upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Attached to each demurrer was a memorandum submitted

in support thereof, the substance of which was to the effect that the amended complaint did not contain allegations of any act or omission on the part of appellees which constituted a violation of any duty owing to appellant. The trial court sustained each of these demurrers. A motion was filed by appellant requesting the court to reconsider its rulings. After reconsideration, the court reaffirmed its rulings and sustained each of the demurrers.

Appellant next filed a second amended complaint. In response to this, appellees filed individual motions to strike it from the files as a sham and frivolous pleading. These motions were sustained. By agreement of the parties, the amended complaint and the separate demurrers thereto were deemed refiled and, appellant refusing to plead over, judgment was entered for appellees. The second amended complaint was made a part of the record by a special bill of exceptions.

The assignment of errors, in brief, states that the court erred in sustaining the demurrers to the complaint and in sustaining the motions to strike out the second amended complaint.

Appellant states that a demurrer admits all facts well pleaded, and all reasonable inferences to be gathered therefrom, so that, in considering this complaint, which is challenged by demurrer, all facts will be deemed stated that could be implied by the allegations made, by fair and reasonable intendment, and that such implied facts carry the same potency as those directly stated, citing authorities therefor.

Appellees take issue thereto, and state that the rule is that when a plaintiff opposes and procures the court to overrule a motion to make his pleading more specific, it is deemed an admission that no facts were relied upon except expressly averred, and that this court cannot imply facts

from allegations in the amended complaint, but must look solely to the allegations of fact contained therein.

In *Swanson v. Slagal, Administratrix* (1937), 212 Ind. 394, 8 N. E. 2d 993, the Supreme Court states that if a motion to make more specific is overruled, no facts not alleged in the complaint will be implied by reason of the allegations of conclusions which have been unsuccessfully challenged by the motion. *Terre Haute, etc., Traction Co. v. Scott* (1926), 197 Ind. 587, 150 N. E. 777; *Pennsylvania R. R. Co. v. Hemmer, Admr.* (1934), 206 Ind. 311, 188 N. E. 285, 189 N. E. 137.

In the case of *Adams v. Holcomb* (1948), 226 Ind. 67, 71, 77 N. E. 2d 891, 893, the court was faced with a complaint to which a motion to make more specific was addressed, asking that the plaintiffs be required to state facts necessary to sustain certain conclusions. The motion had been overruled by the trial court. Thereafter a demurrer was filed, one of the grounds being that the complaint did not state facts sufficient to constitute a cause of action. The court said as follows:

> "In considering the allegations of this complaint we are forced to disregard all conclusions of fact contained therein complained of in appellant's motion to make the complaint more specific, which motion should have been sustained. The appellees' act in opposing and procuring the court to overrule this motion must be deemed an admission that no facts were relied upon except expressly averred. *Enterprise, etc., Pub. Co. v. Craig* (1924), 195 Ind. 302, 144 N. E. 542; *Neal v. Baker* (1926), 198 Ind. 393, 153 N. E. 768."

We may dispose of the specific charges of negligence alleged by appellant, therefore, because he has alleged only conclusions of fact unsupported by any specific facts.

As this action was brought pursuant to the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59), the

rights of appellant and the duties of appellees depend upon that act, and applicable principles of common law as interpreted by the federal courts govern as to all matters of substantive law. *Pennsylvania R. Co. v. Johnson, Admr.* (1930), 91 Ind. App. 412, 420, 169 N. E. 358. As to matters of procedure, the action is governed by the laws of the State of Indiana. *Pennsylvania R. Co. v. Martin* (1931), 93 Ind. App. 258, 266, 170 N. E. 354.

Appellant has alleged as acts of negligence appellees' failure to provide appellant with "a means of protecting his body and person" from moisture and saturation attending his work and in failing and neglecting "to afford or to provide plaintiff with a means of avoiding or counteracting the effects of said moisture and saturation upon his body and person."

The common law rule has been stated to the effect that an employee must look out for himself in so far as provision for his physical wants are concerned, and there is no duty upon the employer toward his employee as to healthfulness or sanitation. 35 Am. Jur., *Master and Servant*, § 105, p. 533.

In *Emerson Brantingham Co. v. Grove* (1922), 191 Ind. 564, 569, 133 N. E. 919, 920, a complaint had been filed alleging that an employee had suffered the loss of an eye which had been destroyed by a flying sliver of steel when a chisel was struck by a sledge-hammer in the employer's factory. Negligence was charged to the employer by failure to provide the employee with "goggles or some other device" in order to prevent such flying slivers striking him in the eye. In stating that a demurrer to the complaint should have been sustained, the court said:

> "Further averments that it was practicable for appellant to supply appellee 'with goggles or some other device' to prevent the flying slivers from striking him in the eyes do not make out a cause of action for

negligence. There is no statute which requires goggles to be furnished by the employer, the facts alleged do not show that any duty to supply them had been imposed by custom or contract, either express or implied, and no such duty was imposed by the common law in the absence of a contract."

However, the court went one step further, and said this:

> "The averment that appellant failed to provide 'some other device' for the protection of the workman, though it was practicable to do so, *is not the statement of any facts at all.*" (Our emphasis.)

In the absence of allegations that there was a duty to supply appellant with means or clothing to protect himself against saturation on account of the moisture, which was imposed either by statute, custom, or contract, the averments are insufficient to charge negligence; and, in addition thereto, the allegations that appellees were negligent in failing "to provide plaintiff with a means of protecting his body" and "of avoiding or counteracting the effects of said moisture" are not statements of fact, but are merely conclusions from which we cannot draw any implications.

Appellant has also alleged that appellees were negligent in using blocks of ice of the alleged dimensions, sizes, and weights (50-pound blocks) in the air-conditioning of the coaches and Pullman cars. This is a general allegation of negligence, with no statement of facts connecting the size of the blocks of ice to appellant's injuries except by the most tenuous inferences.

Appellant further alleges that appellees were negligent in failing "to furnish and provide adequate assistance, means, or modern approved equipment to aid him and lighten his tasks" in the handling of the blocks of ice. Again appellant has made allegations which are nothing but conclusions, and give us no clue as to what kind of

assistance, or means, or equipment the appellees should have provided. Thus, this allegation falls within the prohibition of *Emerson Brantingham Co. v. Grouse, supra.*

The Federal Employers' Liability Act does not authorize recovery in the absence of negligence, and the act is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees thereunder. In using the term "negligence," it includes all the meanings given it by courts and comprehends any negligence of the employer causing or proximately contributing to the injury, whether antecedent or subsequent to negligence of the employee. 56 C. J. S., *Master and Servant*, § 173, c. (1), p. 847, and authorities cited therein.

Under the act, the negligence referred to is common-law negligence. It has been defined as the lack of due care under the circumstances, or the failure to do what a reasonably prudent person would ordinarily have done under the existing circumstances. *Larsen v. Chicago & N. W. R. Co.* (1949), 171 F. 2d 841; *Atlantic Coast Line R. Co. v. Johnson* (1952), 199 F. 2d 750, 200 F. 2d 619; *Morcades v. New Orleans Terminal Co.* (1953), 111 F. Supp. 650; *Tiller v. Atlantic Coast Line R. Co.* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967.

"In all cases involving negligence there are three elements essential to a cause or right of action: (1) The existence of a duty or obligation on the part of defendant to protect plaintiff from injury. (2) Failure of a defendant to perform or discharge that duty. (3) Injury resulting to plaintiff from such failure by defendant. These elements when brought together constitute actionable negligence, and the absence of any one renders the complaint bad. *Shuttleworth v. Crown Can Co.* (1948), 165 F. 2d 974.

Failure to act, or omission, is a ground of negligence, but to permit recovery in such case it must be made to appear that such failure was the proximate cause of the accident. Plaintiff must allege and prove not only that the defendant was negligent, but that the injury resulted proximately in whole or in part from that negligence. *Brady* v. *Southern Ry. Co.* (1943), 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239; *Louisville & N. R. Co.* v. *Maddox* (1938), 236 Ala. 594, 183 So. 849, 118 A. L. R. 1318. The act does not make defendant the insurer of the safety of its employees while they are on duty. The basis of its liability is its negligence, not the fact that injuries occurred. *Larsen* v. *Chicago & N. W. R. Co., supra; Chicago, Rock Island & Pacific Railroad Co.* v. *Lint* (1954), 217 F. 2d 279; *Chesapeake and Ohio Railway Company* v. *Burton* (1954), 217 F. 2d 471.

Under the common law there was no duty imposed upon an employer to examine his employees to ascertain if they were physically fit to do the job they sought. *Potter Title & Trust Co.* v. *Ohio Barge Line* (1950), 184 F. 2d 432; *McGuigan* v. *Southern Pac. Co.* (1952), 112 Cal. App. 2d 719, 247 P. 2d 415.

In this case the amended complaint alleges that approximately one month prior to July 14, 1953, appellant was suddenly taken ill by reason of a heart attack. He was compelled to leave his work temporarily. He returned to work some time prior to July 14, 1953, "with the acquiescence and consent" of the appellees. It is stated that at all times the appellees knew of his "physical condition." Upon his return to work, it is alleged that he was ordered and directed by the appellees to perform the work which he had been previously engaged in, that is, handling 50-pound blocks of ice, and that he was so ordered to perform this work, without a physical examination, by appellees, wherein they could have determined appellant's "true physical condition," which condition was such as to make it

reasonably probable that the work when undertaken by appellant would be injurious to his health. The specific act of negligence charged is in "allowing and permitting, and ordering, commanding, and directing plaintiff to perform and to engage in said type of employment, as aforesaid, without first ascertaining his physical fitness therefor." There is no allegation that appellant was unaware of his condition or had no knowledge of it. This being so, we must assume that he was as fully aware of his own physical condition as were appellees when he returned to work.

"It has been held that is negligence for an employer to place his employee in arduous employment when the employer knows, or has reason to believe, that the employee is afflicted with a disease from which an injury might naturally follow in such employment when the employee *does not know* he is so afflicted, nor know of dangers incident to such employment by reason of the disease. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Perryman* (1948), 200 Okla. 266, 271, 192 P. 2d 670, 675. The Oklahoma court quotes from the case of *L. & W. R. R. Co.* v. *Sawyers* (1916), 169 Ky. 671, 675, 184 S. W. 1123, 1124, as follows:

> "'The only safe and practical rule is that each man is the best judge of his own physical strength and powers of endurance; that he knows better than any other can when the limit has been reached, and when, in following his instinct of self-preservation, he must desist and exercise his right under the law to give up his work if it is more than he can stand.'"

The common-law rule has been stated that the servant must determine for himself whether his health and strength are adequate for the performance of the labor agreed to be performed. This duty is not upon the master. *Warden-Pullen Coal Co.* v. *Wallace* (1936), 176 Okla. 604, 606, 56

P. 2d 802, 804. In the last-cited case the court speaks as follows:

> "We know of no rule of law that imposes upon the master the obligation to supervise the contracts of employment which the servant may enter into with him and other parties in order to protect him from exertions beyond his strength. The right freely to enter into contracts of employment and to agree upon the terms thereof is one of the most sacred prerogatives of a free people, and even the state itself cannot infringe upon this right, except under the police power to protect the public health and welfare."

In the annotation in 175 A. L. R., page 990, the following is stated:

> "In 3 Labatt, Master and Servant, 2d ed. 287, § 1082, the author, recognizing that unfitness may create a cause of action in favor of the unfit servant himself, says, 'The reason why recovery on this ground is so rarely sought is doubtless that, in the nature of the case, the unfit servant is almost always aware of his unfitness. The effect of his knowledge is to bring the situation within the scope of the principle that, if a person of apparently full age and complete understanding undertakes certain duties, he is presumed to appreciate and accept the risks incident to those duties.'"

In *Glidden* v. *Bath Iron Works* (1947), 143 Me. 24, 54 A. 2d 528, 175 A. L. R. 976, the Maine Supreme Judicial Court reversed the overruling of a demurrer to a complaint wherein it was alleged that the plaintiff sustained an aggravation of a serious heart disease induced by manual labor and strenuous physical exertion required of him as an employee of the defendant. The court stated that the complaint did not state a cause of action because it did not allege that the defendant knew, or should have known, that the plaintiff did not know his own condition. In that case plaintiff had alleged that he did not know of his condition.

In finding the complaint in this case insufficient, we do not need to go as far as the Maine court because there was no allegation herein that appellant was unaware or had no knowledge of his condition. We hold therefore that in a situation of this kind appellant has not alleged sufficient facts to show a duty on the part of appellees, the breach of which would establish common-law negligence.

Appellant has cited many cases wherein allegations were made of negligence which the courts deemed sufficient to establish a cause of action. These cases involved incidents where the employee was coerced or forced by the employer to take some action pursuant to command which the employer knew, or should have known, could have resulted in injury, or where the employee was required to use defective tools or appliances, or where the employee was put in a place of danger, or ordered to do unusual labor because of an emergency. These elements are not involved in this case. Appellant did not allege that he was forced to return to work, but returned with the "acquiescence and consent" of appellees. It is alleged that he was ordered and commanded to perform the work he previously had been performing, but there is no allegation that there was anything unusual or extraordinary about the work. The implications are that it was the same type of work that he had always undertaken. There are no allegations that he complained of his duties or requested a change in his work. There are no allegations that the first heart attack was caused by or related to his employment in any way. There are no allegations that he was placed in unsafe and dangerous premises to perform his work, or that any equipment he may have used in connection therewith was defective.

Appellant argues that appellees are attempting to insert contributory negligence and assumption of the risk into this case. Sections 53 and 54 of the act provide, respec-

tively, that contributory negligence of the employee shall not bar a recovery by him, but, except in certain limited cases, shall result in a proportional diminution of damages, and abolishes the common law doctrine of assumption of the risk. However, it must be remembered that at common law these were always defenses to an acknowledged charge of negligence. Here there is no adequate statement of facts charging appellees with negligence of any kind.

In *Knox* v. *Schomaker* (1942), 191 Okla. 337, 339, 129 P. 2d 841, 842, the court states the rule as follows:

> "The rule is that where the servant is aware of his infirmity or his unfitness for the particular work, the master is guilty of no negligence toward him in merely allowing him to continue in the same employment. The master is not bound at his peril to discharge the servant. *Whether the servant assumes the risk or is guilty of contributory negligence is of no importance.* The demands of common, ordinary justice will permit no other conclusion. Where the uncontradicted evidence shows that the servant was as well aware of his unfitness as was the master, the master as a matter of law is not guilty of primary negligence." (Our emphasis.)

Thus the doctrine of assumption of the risk and contributory negligence has no application in this case because there is no allegation of primary negligence on the part of appellees.

Appellant has made a valiant attempt to present a cause of action herein. However, we are restrained by the accepted rule of the common law from upholding this complaint. We know of no statute or judicial decision which places an affirmative duty upon these appellees to require a workman for hire to take a physical examination before going to work or before returning to work from an illness. It may well be that it is socially desirable to insist upon such a physical examination of all employees in industry

before permitting them to go to work, just as is done with prospective members of the armed forces of the United States. It is quite possible that it would be economically sound practice to require such preliminary physical qualification and thereby increase efficiency and lower costs of maintenance. But we express no opinion as to this, for it seems to us that the legislative branch of our government is charged with the power and reasoning of determining whether such requirement should be created. Either that, or the same could be accomplished by means of private agreement between employer and employee. If such obligation is to be placed upon the employer, the appropriate means is by either contract or legislative action, and not by judicial fiat. See *Potter Title & Trust Co. v. Ohio Barge Line, supra.*

As a further reason for sustaining the trial court, we point out again that appellant has pleaded conclusions of fact from which, even if we were permitted, we could draw only the most speculative inferences and implications. He has alleged that at the time of the first heart attack appellees then knew of his "condition." He then alleged that if appellees had given him a physical examination they could have determined his "true condition." There are no facts alleged to indicate in any respect what his "condition" or his "true condition" was and whether or not there was any difference between the two. Whatever inferences or implications could be drawn from these conclusions would be only the wildest guesswork.

Appellant finally claims error in the ruling of the trial court striking the second amended complaint from the files as a sham and frivolous pleading. The record shows that by agreement of the parties the amended complaint and the separate demurrers thereto were deemed refiled. Appellant has based his case on the amended complaint and has presented his arguments thereto. By so doing, and in

agreeing that this complaint should be refiled, he has waived any error which may have been committed in striking out the second amended complaint.

We do not find that the court committed error in sustaining the demurrers to the complaint.

Judgment affirmed.

AX, *C. J.*, and COOPER and RYAN, *J. J.*, concur.

APPELLATE COURT RULING ON PETITION FOR REHEARING.

Motion to dismiss appellant's petition for rehearing sustained for failure to comply with Rule 2-22. MYERS, *J.*

SUPREME COURT RULING ON PETITION TO TRANSFER.

Appellant's Petition to Transfer denied. FREDERICK LANDIS, *C. J.*

APPENDIX C.

INDIANA SUPREME COURT RULES.

Rule 2-22. Rehearings. Application for a rehearing of any cause shall be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within 20 days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within 10 days after the filing of the petition. Adopted April 17, 1940. Effective September 2, 1940. Amended June 17, 1943. Effective September 6, 1943.

Rule 2-23. Transfers. A petition to transfer a cause from the Appellate Court to the Supreme Court shall be separate from the briefs in support thereof and shall be filed within 20 days after a petition for rehearing has been denied. The petition shall set forth briefly:

(1) That the Appellate Court decided the case with a written opinion, giving the date when the opinion was filed.

(2) That the decision of the Appellate Court was against the party seeking the transfer.

(3) That a petition for a rehearing was filed with the Appellate Court in time and that a rehearing was denied, giving the date of such denial:

(4) That the opinion of the Appellate Court:

(a) contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent;

(b) or that the opinion of the Appellate Court erroneously decides a new question of law, concisely stating the same;

(c) or that the Appellate Court failed to give a statement in writing of each substantial question arising on the record and the decision of the court thereon. If this cause is relied on the petition shall set out or exhibit so much of the record, assignment of errors, briefs and opinion as will affirmatively disclose such failure and establish that the petitioner was prejudiced thereby.

Briefs may be filed with and in support of the petition but they shall not be necessary to invoke the jurisdiction of the court. Parties opposing the transfer may file briefs within 10 days after the filing of the petition. Adopted April 17, 1940. Effective September 2, 1940.

BURNS INDIANA STATUTES ANNOTATED.
1946 REPLACEMENT.

Sec. 4-214. Appeals to be taken to the Supreme Court—All others to the Appellate Court.

Hereafter all appeals in appealable cases in the following classes shall be taken directly to the Supreme Court, viz.:

First. All cases in which there is in question, and such question is duly presented, either the validity of a franchise or the validity of an ordinance of a municipal corporation, or the constitutionality of a statute, state or federal, or the rights guaranteed by the state or federal constitution.

Second. All criminal prosecutions.

Third. Actions to contest the election of public officers.

Fourth. Cases of mandate and prohibition and actions or proceedings in quo warranto.

Fifth. Cases of habeas corpus.

Sixth. Proceedings to establish drains and proceedings to change or improve water-courses.

Seventh. Condemnation proceedings for the appropriation of lands for public use.

Eighth. Proceedings to establish graved roads and proceedings to establish public highways and proceedings to vacate public highways.

Ninth. Prosecutions for contempt of the lower courts.

Tenth. Applications for admission to the bar to practice law and proceedings to disbar an attorney-at-law.

Eleventh. Appeals may be taken to the Supreme Court from the following orders: Interlocutory orders for the payment of money or to compel the execution of any instrument in writing or the delivery or assignment of any securities, evidences of debt, documents or things in action.

Twelfth. Interlocutory orders for the delivery of the possession of real property or the sale thereof.

Thirteenth. Interlocutory orders appointing or refusing to appoint receivers; and interlocutory orders granting or refusing to grant, or dissolving or overruling motions to dissolve, temporary injunctions.

Fourteenth. Interlocutory orders upon writs of habeas corpus: Provided, That in any such case where an appeal is taken from an interlocutory order involving the custody of an infant, the court from which such appeal is taken shall make such order concerning the care and custody of such infant during the dependency of such appeal as shall be for the best interest of such infant.

All appealable cases other than those herein mentioned shall be taken to the Appellate Court. (Acts 1901, ch. 247, § 9, p. 365; 1907, ch. 148, § 1, p. 237; 1915, ch. 76, § 1, p. 149; 1925, ch. 291, § 1, p. 487.)

Sec. 4-215. Jurisdiction of Appellate Court—When final—Transfer to Supreme Court—Cash deposit.

The jurisdiction of the Appellate Court shall be final, except under the following conditions:

* * * * *

Second. If a petition for a rehearing is filed by any losing party in any case in either of said divisions of the Appellate Court and said petition is overruled, the clerk of said court shall not certify the opinion and judgment in said case to the lower court until the expiration of thirty (30) days from the date of said ruling.

Said party may, at any time within thirty (30) days after his petition for a rehearing has been overruled, file in the Supreme Court an application for the transfer of the case to the Supreme Court on the ground that the opinion of said division of the Appellate Court contravenes a ruling precedent of the Supreme Court, or that a new question of law is directly involved and was decided erroneously. The application shall state with particularity the ground or grounds relied on. The party seeking to file such application shall, at the time of such filing, deposit with the clerk of the Supreme Court a cash deposit in the sum of fifty dollars ($50.00). Upon the filing of such application, and said cash deposit, the clerk shall not certify to the lower court the opinion and judgment of said division of the Appellate Court, unless and until the Supreme Court denies the application. * * *. (Acts 1901, ch. 247, § 10, p. 565; 1933, ch. 151, § 1, p. 800.)